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JUL 24 2006

HEARING OFFICER OF THE  
SUPREME COURT OF ARIZONA  
BY ASB

BEFORE A HEARING OFFICER

OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A SUSPENDED ) No. 04-2103  
MEMBER OF THE STATE BAR OF )  
ARIZONA, )  
) **RECOMMENDATION OF**  
**CHERYL CAYCE,** ) **HEARING OFFICER 9I**  
Bar No. 012447 )  
)  
Respondent. )  
)

The State Bar of Arizona, represented by Denise Tomaiko, Esq. and Respondent Cheryl Cayce, represented by Brick P. Storts, III, have submitted a Tender of Admissions and Agreement for Discipline by Consent pursuant to Rule 56(a) Ariz.R.Sup.Ct. The hearing officer has reviewed the Tender and Agreement and the Joint Memorandum in Support of the Agreement for Discipline by Consent. For the reasons set forth below, the hearing officer recommends acceptance of the Agreement.

**CONDUCT**

As reflected in the Tender of Admissions and Agreement for Discipline by Consent ("Tender"), Respondent has conditionally admitted that her conduct violated Rule 42 Ariz.R.Sup.Ct. Specifically, ER 1.1, ER 1.4(a) & (b), ER 3.1, ER 3.3, ER 3.4, ER 4.1 and ER 4.4(a).

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1 August 20, 2004, Respondent called Judge Munger to discuss the August 19,  
2 2004 hearing. That telephone call was recorded and later transcribed. During the  
3 telephone call between Respondent and Judge Munger, Respondent stated, "I was  
4 unaware yesterday that my clients received communication from the mother that  
5 she had the child and had an attorney." Respondent's client had received a letter  
6 from counsel for the mother prior to the August 19, 2004 hearing. During the  
7 August 20, 2004, telephone call Judge Munger directed Respondent to file a  
8 request for a criminal contempt hearing against her client.  
9

11 On August 23, 2004 Respondent told her clients about the telephone call  
12 with Judge Munger but did not tell them all the details including, but not limited  
13 to, Respondent's statements to the court concerning her clients. Thereafter she  
14 did not fully advise her clients concerning the contempt action that the court had  
15 directed Respondent to commence against her.  
16

17 Shortly thereafter, Respondent advised her client that she had a potential  
18 conflict of interest and that she should retain other counsel. The client  
19 subsequently retained other counsel.  
20

21 After an evidentiary hearing on October 18 and 25, 2004, Judge Munger  
22 did not find the client guilty of the contempt charges but stated the following:  
23

24 1. Respondent and her clients knew pertinent facts that they did not tell  
25 the court;

2. This was not a victimless act because the mother was hurt and the child was used improperly and so was the legal system.

At the contempt hearing Judge Munger ordered the clients' new counsel to file charges against the Respondent with the State Bar, which she did. Subsequently the child's mother filed an action against Respondent for malicious prosecution and negligent infliction of emotional distress. The Complaint was amended to name the clients as co-defendants. The clients subsequently sent a demand letter to Respondent that they wished to assert a malpractice claim against her as well and tendered their defense to Respondent. All of these matters were subsequently settled between the parties.

## SANCTIONS

Respondent and the State Bar have agreed that based on the conditional admissions, the following disciplinary sanctions shall be imposed:

1. Respondent will receive a ninety-day suspension and be placed on probation for one year for violating Rule 42, Ariz.R.Sup.Ct., specifically ER 1.1, ER 1.4(a) & (b), ER 3.1, ER 3.3, ER 3.4, ER 4.1 and ER 4.4(a). The suspension will commence on the date of the final judgment and order entered in this matter and run concurrently with the term of probation.

2. The terms and conditions of probation will include the following:

- 1 a. The term of probation shall be for one year, to commence on the  
2 date of the final judgment and order entered in this matter and run  
3 concurrently with the suspension term.  
4
- 5 b. Respondent shall contact the Director of the Members Assistance  
6 Program (MAP”) within thirty (30) days of the final judgment  
7 and order and submit to an assessment. Respondent thereafter  
8 will enter into a MAP contract based upon recommendations  
9 made by the MAP director or designee. Respondent shall comply  
10 with the recommended terms.  
11
- 12 c. Respondent shall contact the Director of the Law Office  
13 Management Assistance Program (“LOMAP”) within thirty (30)  
14 days of the final judgment and order and submit to an assessment.  
15 Respondent thereafter will enter into a LOMAP contract based  
16 upon recommendations made by the LOMAP director or  
17 designee, including the use of a practice monitor. Respondent  
18 shall comply with the recommended terms.  
19
- 20 d. Respondent shall attend continuing legal education of at least six  
21 hours in the area of family law and/or guardianship and shall  
22 provide proof of completion and a copy of her notes from the  
23 CLE to LOMAP.  
24  
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1 e. Respondent's failure to comply with any of the foregoing terms  
2 and conditions will result in the filing of a notice of non-  
3 compliance by the State Bar with the hearing officer. A hearing  
4 will then be held within thirty (30) days to determine whether  
5 Respondent has breached the agreement. Finding that  
6 Respondent breached the terms and conditions of probation may  
7 result in the imposition of sanctions.  
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9

10 3. Respondent shall pay all costs incurred by the state Bar in  
11 connection with these proceedings, including the assessment by MAP.  
12

### 13 ABA STANDARDS

14 The hearing officer has reviewed the analysis of the *ABA Standards*  
15 contained in the Joint Memorandum in Support of Agreement for Discipline by  
16 Consent and agrees that under the *ABA Standards* suspension is appropriate.  
17

18 *Standard 4.42* applies to violations of ER 1.4 and provides:

19 "Suspension is generally appropriate when ... (b) a  
20 lawyer engages in a pattern of neglect and causes injury  
21 or potential injury to a client."

22 *Standard 6.12* applies to violations of ER 3.3 and ER 4.1 and provides:

23 "Suspension is generally appropriate when a lawyer  
24 knows that false statements or documents are being  
25 submitted to the court or that material information is  
improperly being withheld, and takes no remedial  
action, and causes injury or potential injury to a party to

1 the legal proceeding, or causes an adverse or potentially  
2 adverse effect on the legal proceeding.”

3 Under the *ABA Standards*, a suspension is warranted. The issue then  
4 becomes the length of such suspension.

### 5 **DUTY VIOLATED**

6  
7 Respondent knew that incomplete and misleading documents had been  
8 submitted to the court but failed to take reasonable measures to remedy the  
9 situation. She also neglected duties to her client throughout the representation.  
10 She failed to fully investigate the facts and circumstances, attended two hearings  
11 without correcting the pleadings or fully informing the court of all relevant facts  
12 and failed to remedy her misrepresentations to the court once she discovered false  
13 information had been provided to the court. In doing so she violated her duties to  
14 her client, to the court, to the legal system and to the profession.  
15  
16

### 17 **MENTAL STATE**

18 Respondent has conditionally admitted, and the hearing officer accepts the  
19 admission, that Respondent acted knowingly and with a conscious awareness of  
20 the nature and attendant circumstances of the conduct but without the conscious  
21 objective or purpose to accomplish a particular result. See *In re Moak*, 205 Ariz.  
22 351, 71 P.3d at 343 (2003). Respondent knowingly submitted pleadings that were  
23 inaccurate, incomplete or misleading. Respondent knowingly filed a  
24 Guardianship Petition and appeared at the hearing without giving prior notice to  
25

1 the mother. Respondent knowingly failed to take reasonable and timely remedial  
2 measures to correct the inaccurate, incomplete and misleading evidence she had  
3 previously submitted to the court. Respondent knowingly failed to fully inform  
4 the court of all material known facts that would enable the court to make an  
5 informed decision.  
6

### 7 EXTENT OF INJURY

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9 Clearly Respondent's misconduct resulted in actual and potential injury to  
10 her client, to the other parties of the legal proceedings, including injury to the  
11 mother of the subject child and the child.  
12

### 13 AGGRAVATING AND MITIGATING CIRCUMSTANCES

14 In aggravation there is only one aggravating factor: Respondent's  
15 substantial experience in the practice of law. Respondent was admitted to  
16 practice in Arizona on May 20, 1989.  
17

18 There are several significant mitigating factors including:

- 19 1. Absence of a prior disciplinary record;
- 20 2. Timely good faith efforts to make restitution or to rectify  
21 consequences of misconduct;
- 22 3. Full and free disclosure to the Bar and cooperative attitude toward  
23 the proceeding;
- 24 4. Imposition of other penalties or sanctions; and,  
25



1           5.     Remorse.

2           The mitigating factors substantially outweigh the aggravating factor and  
3 support acceptance of the Tender and the proposed sanction.  
4

5                           **PROPORTIONALITY**

6           The hearing officer has reviewed the proportionality analysis done by the  
7 stipulating parties and agrees that the proposed sanction is reasonable under the  
8 circumstances. Respondent's conduct, absent the substantial mitigation, would  
9 justify a suspension longer than that proposed. In *In re Moak, supra*, Moak was  
10 suspended for six months and one day. Moak represented a client in two separate  
11 actions arising from two car accidents. Moak failed to disclose material facts  
12 relating to personal injury claim that he asserted on behalf of his client. His  
13 failure misled the judge and the jury. Moak's conduct violated ER 3.3, ER 4.1,  
14 ER 8.4 (c) & (d). The court found four aggravating factors including selfish and  
15 dishonest motive, a pattern of misconduct, multiple offenses and substantial  
16 experience in the practice of the law. The court considered four mitigating  
17 factors; no prior discipline, and cooperation with the disciplinary process,  
18 imposition of other sanctions and penalties and remorse.  
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23           The mitigating factors far outweigh the aggravating factor in this case. In  
24 light of Moak, the ninety-day suspension appears appropriate.  
25

1 Similarly, *In re Alcorn and Feola*, 202 Ariz. 62 (2002) two attorneys were  
2 suspended for six months after they agreed and participated in a sham trial  
3 concocted by a personal injury plaintiff. Again, *Alcorn's and Feola's* misconduct  
4 was far more egregious than plaintiff's because they acted intentionally and each  
5 had a prior disciplinary sanction. Here Respondent acted knowingly (not  
6 intentionally) and had no prior discipline.  
7

8  
9 The proposed ninety-day suspension with the other conditions is  
10 appropriate.

### 11 CONCLUSION

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13 Based upon the Tender of Admissions and Agreement for Discipline by  
14 Consent, the Joint Memorandum in Support of the Agreement for Discipline and  
15 Consent and the hearing officer's independent review of both and applicable case  
16 law, it is hereby recommended that the recommended sanction be accepted; that  
17 the Respondent be suspended for ninety days; placed on one year probation with  
18 specific terms to include submission to and cooperation with an assessment  
19 performed by the State Bar's Members Assistance Program ("MAP"); submission  
20 to and cooperation with an assessment performed by the State Bar's Law Office  
21 Management Administration Program ("LOMAP"); a practice monitor for one  
22 year; at least six hours of continuing legal education in the area of family law  
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1 and/or guardianship; and payment of the costs incurred in this disciplinary  
2 proceeding.

3  
4 **DATED** this 24<sup>th</sup> day of July, 2006.

5 Dwight M. Whitley, Jr.  
6 Dwight M. Whitley, Jr.  
7 Hearing Officer 91

8 Original of the foregoing mailed  
9 this 24 day of July, 2006, to:

10 Disciplinary Clerk of the Supreme Court  
11 Certification and Licensing Division  
12 1501 W. Washington, #104  
13 Phoenix, Arizona 85007-3329

14 Copy of the foregoing mailed  
15 this 24 day of July, 2006, to:

16 Brick P. Storts, III  
17 BARTON & STORTS, PC  
18 271 North Stone Avenue  
19 Tucson, Arizona 85701  
20 *Attorney for Respondent*

21 David H. Liberthal  
22 3900 East Broadway  
23 Suite 210  
24 Tucson, Arizona 85701  
25 *Settlement Officer 9H*

26 Lawyer Regulation Records Manager  
27 State Bar of Arizona  
28 4201 N. 24<sup>th</sup> Street, Suite 200  
29 Phoenix, Arizona 85016

30 by: Christina [Signature]